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IN THE

Supreme Court of the United States

October Term, 1962

No. 71

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELAN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT, and ROSE MARIE COLLINS,

Petitioners,

—v.—

CITY OF GREENVILLE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Supreme Court of South Carolina (R. 55) is reported at 122 S. E. 2d 826 (1961). The opinion of the Greenville County Court is unreported but is set forth in the printed record (R. 50).

Jurisdiction

The judgment of the Supreme Court of South Carolina was entered November 10, 1961 and petition for rehearing denied on November 30, 1961. The petition for certiorari

was filed on February 26, 1962 and granted by this court on June 25, 1962.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257 (3), petitioners having asserted below, and asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 16-388, Code of Laws of South Carolina, 1952, as amended 1960:

Any person:

(1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned within six months preceding, not to do so or

(2) who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,

Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.

3. This case involves Section 31-8, Code of Greenville, 1953 as amended by 1958 Cumulative Supplement.

It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house,

boarding house or similar establishment to furnish meals to white persons and colored persons in the same room, at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities are furnished. Separate facilities shall be interpreted to mean:

a) Separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise;

b) Separate tables, counters or booths;

c) A distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served;

d) The area referred to in subsection (c) above shall not be vacant but shall be occupied by the usual display counters and merchandise found in a business concern of a similar nature;

e) A separate facility shall be maintained and used for the cleaning of eating utensils and dishes furnished the two races.

Questions Presented

Petitioners have been arrested, convicted, and sentenced for refusal to obey an order to leave the lunch counter in a store open to the public, including Negroes. This order was given to enforce a City Ordinance and a community custom generated by a massive body of state segregation law. The premises are extensively licensed and regulated by the State. South Carolina has failed to accord Negroes the right of equal access to public accommodations.

I.

A. Whether a State may arrest and convict petitioners of trespass where a City Ordinance required the policy of excluding Negroes to be enforced?

B. May South Carolina, compatibly with the Fourteenth Amendment, make petitioners the target of a prosecution under its trespass laws when the rationale of the prosecution is to enforce a claimed legal right of racial discrimination of the S. H. Kress Corporation?

C. Are not these criminal trespass prosecutions, in any event, incompatible with the Fourteenth Amendment because they constitute purposeful state enforcement of a custom of racial discrimination—a custom which is itself the carefully nurtured fruit of decades of segregation required by state law?

D. Is not the degree of supervision and control which the State of South Carolina exercises over the S. H. Kress lunch counter business so extensive a form of state involvement that, given the circumstances of A, B and C, *supra*, South Carolina has failed in its obligation to afford equal protection of the laws?

E. In addition to considerations set forth above, is not the property right which S. H. Kress and Co. has asserted —the right to discriminate racially in a single portion of a store open to the general public—so inconsequential to the main core of its proprietary interest, that the State may not compatibly with the Fourteenth Amendment, enforce that right by its criminal laws?

F. In view of the fact that South Carolina denies protection to Negroes against racial discrimination in public accommodations, do not the circumstances set forth above establish a denial of equal protection of the laws?

II.

A. Is not South Carolina denying petitioners freedom of speech secured by the Fourteenth Amendment by using its criminal trespass laws as a device to stop petitioners from urging S. H. Kress and Company to abandon its discrimination practices?

B. Is not freedom of speech impaired by failure to construe the statute under which conviction was obtained to require notice that the request to leave the premises was given by one who had established authority to issue such request at the time given?

Statement

Petitioners, ten Negro students, were arrested for participating in a sit-in demonstration at the lunch counter of the S. H. Kress and Company department store on August 9, 1960 (R. 8), in Greenville, South Carolina, a city which by ordinance requires segregation in eating facilities (R. 11), were convicted of trespass in violation of Section 16-388, Code of Laws of South Carolina, 1952, as amended 1960, and sentenced to pay a fine of one hundred dollars ($100.00) or serve thirty (30) days in jail (R. 47).

At about 11:00 a.m. on August 9, 1960, petitioners entered the Kress department store and seated themselves at the lunch counter (R. 36). The store services Negroes in all departments except the lunch counter which is reserved for whites (R. 14, 22). Petitioners requested service and were told, "I am sorry, we do not serve Negroes." White persons were seated at the counter and were being served at the time. The manager of the store, Mr. West, upon noting that petitioners had seated themselves at the white lunch counter, approached them and requested,

"everybody to leave, that the lunch counter was closed" (R. 19). He said his purpose in closing the counter at a time when it ordinarily would be operated was to prevent Negroes from using a lunch counter reserved for whites. Mr. West was aware that the petitioners were participating in a demonstration to secure service at the lunch counter on an equal basis, as previous sit-in demonstrations had been staged there by some of the petitioners. Further, petitioner Doris Wright had been in communication with him to request service for Negroes, and during these communications she was told of the near success of the demonstrations and received a promise that no charges would be pressed if the protests against segregated luncheon facilities were continued (R. 38-39). Mr. West, in fact, did not request the arrest of petitioners, nor did he sign the complaint against them (R. 5, 16-17).

Also, at about 11:00 a.m. Captain Bramlette of the Greenville Police Department received a call that some colored boys and girls were at the lunch counter. He knew that the City of Greenville had an ordinance prohibiting colored and white persons from being served at the same eating facilities (R. 10-11). He proceeded to the store, entered with several policemen, and found two agents of the South Carolina Law Enforcement Department already present at the lunch counter (R. 7). He noticed the ten petitioners seated at the counter which could accommodate almost fifty-nine persons (R. 7, 25). Although Mr. West made no request of the officers to remove the petitioners, Captain Bramlette arrested them a few minutes after the announcement was made that the counter was closed (R. 8).[1] The petitioners, according to the testimony of the arresting officer and the

[1] Four other Negro demonstrators were arrested, but their cases were disposed of by the juvenile authorities (R. 7).

manager, were clean, neatly dressed, orderly, and used no profanity (R. 12-13, 24).

A witness for the defense, Mr. Raymond Carter, who was standing nearby during the demonstration, testified that at the time Mr. West announced the closing of the counter, the whites who were sitting remained seated but were not arrested (R. 30). (This testimony was disputed by Mr. West, who claimed that the whites who were sitting at the counter removed themselves upon his announcement (R. 19).) Mr. Raymond Carter gave further testimony, supported by Mr. West, that after petitioners were arrested and escorted from the premises, counter service to whites promptly was resumed (R. 23, 31).

Mr. West testified that he instructed one of the store's employees to call the police; but when petitioners' counsel attempted to ascertain whether there was any pre-arrangement or agreement between the store and the police to secure the arrest of the demonstrators, the court denied permission to proceed (R. 22-23). Mr. West stated that he closed the lunch counter because of a Greenville city ordinance requiring racial segregation in eating facilities and local custom:

> Q. Mr. West, why did you order your lunch counter closed? A. It's contrary to local custom and it's also the ordinance that has been discussed (R. 23).

On cross examination, Captain Bramlette, the arresting officer, evidenced confusion as to whether defendants were arrested because they violated Greenville's ordinance requiring segregation in eating facilities or the State of South Carolina's trespass statute:

> Q. Did the manager of Kress', did he ask you to place these defendants under arrest, Captain Bramlette? A. He did not.

Q. He did not? A. No.

Q. Then why did you place them under arrest? A. Because we have an ordinance against it.

Q. An ordinance? A. That's right.

Q. But you just now testified that you did not have the ordinance in mind when you went over there? A. State law in mind when I went up there.

Q. And that isn't the Ordinance of the City of Greenville, is it? A. This supersedes the order for the City of Greenville.

Q. In other words, you believe you referred to an ordinance, but I believe you had the State statute in mind? A. You asked me have I, did I have knowledge of the City Ordinance in mind when I went up there and I answered I did not have it particularly in my mind, I said I had the State Ordinance in my mind.

Q. I see and so far this City Ordinance which requires segregation of the races in restaurants, you at no time had it in mind, as you went about answering the call to Kress' and placing these people under arrest? A. In my opinion the state law was passed recently supersedes our City Ordinance (R. 16-17).

This "State law" is the trespass statute petitioners were charged with violating. Previously, Captain Bramlette had testified that he thought the State's trespass statute expressly mentioned "sit-ins" (R. 15).

Kress and Company is a large nationwide chain which operates junior department stores (R. 20). The Greenville branch has fifteen to twenty departments, sells over 10,000 items, and is open to the general public (R. 21). Negroes and whites are invited to purchase and are served alike with the exception that Negroes are not served at the lunch counter which is reserved for whites (R. 14, 22). Kress'

national policy is "to follow local customs" with regard to serving Negroes and whites at its lunch counters (R. 21).

Petitioners were tried and convicted in the Recorder's Court of Greenville before the City Recorder, sitting without a jury, and sentenced to pay a fine of one hundred dollars ($100.00) or serve thirty (30) days in the city jail (R. 2).

Petitioners appealed the judgment of Recorder's Court to the Greenville County Court, which dismissed the appeal on March 17, 1961 (R. 2).

The Supreme Court of South Carolina entered its judgment, affirming the judgment and sentences below on November 10, 1961, and denied rehearing on November 30, 1961 (R. 59, 62).

Summary of Argument

I.

Despite a City Ordinance requiring segregation in eating facilities which compelled the store manager to refuse service to Negro petitioners, the Supreme Court of South Carolina held it was only neutrally enforcing the property right of the owner of a department store. But segregation enforced by legislation violates the rights of petitioners to the equal protection of the laws. Secondly, while in some circumstances there may be a personal privilege to make racial distinctions it cannot apply when segregation is required by law and, moreover, its limit is reached when the person exercising it turns to the State for assistance. Judicial and police action are no less forbidden State action when invoked to enforce discrimination initiated by an individual. Any suggestion that private rights, in the sense that they invoke considerations of privacy, are in-

volved is farfetched. Kress's has been open to the public in general. The management did not assert the corporation's own preference for a segregation policy, but rather, as stated explicitly in the record, the policy of a City Ordinance and the custom of the community. While considerations of privacy are meaningful in determining the reach of some constitutional liberties, the right in this case, to freedom from State imposed racial discrimination is not in competition with any interest the State might have in protecting privacy.

At the very least, however, the State may not enforce racial discrimination which expresses deep-rooted public policy. The record here conclusively shows that this is what happened in this case. Such customs are a form of State action. But beyond this, the segregation customs in this case were generated by a host of State segregation laws including a City Ordinance compelling segregation in eating facilities. Scholarship establishes the crucial role which government, politics, and law have played in creating segregation customs.

But the State-enforced, State-created community custom of segregation in this case is even more vicious because it has taken place in an establishment in which the State has been deeply involved by requiring extensive licensing and regulation. State involvement in such an enterprise precludes State enforcement of segregation therein by means of arrests and prosecutions for trespass.

The holding below that the State merely was in a neutral fashion enforcing a property right does not decide this case. States can and have constitutionally forbidden property owners to discriminate on the basis of race in public accommodations. South Carolina has not inhibited itself from requiring racial segregation on private property. The

more an owner for his advantage opens his property for use by the public in general, the more do his rights become circumscribed by the constitutional and statutory rights of those who use it.

Property is a bundle of rights and privileges granted by the State. That portion of the rights which constitute Kress's property, which Kress asserts here, and which the State has enforced is to control the conduct and association of others. This type of property right historically has never been unrestrained throughout the whole range of efforts to assert it. Restraints on that power are but a manifestation of the fact that law regularly limits or shapes property rights where they may have harmful public consequences. Other characteristics of the asserted right to racially discriminate in this case are that no claim of privacy has been intruded upon; that petitioners sought only to use the premises for their intended function; that segregation was required only in a single part of an establishment open to the general public, to which petitioners were admitted, and in which they were invited to trade freely except at the lunch counter in question. This sliver in the entire complex of powers and privileges which constitutes Kress's property is hardly entitled to legal protection when it collides with the Equal Protection Clause of the Fourteenth Amendment, whose purpose was an end of discrimination against the Negro.

Moreover, the *Civil Rights Cases* assumed the States provided "a right to enjoy equal accommodations and privileges . . . one of the essential rights of the citizen which no state can interfere with." The failure to provide such rights can deny the equal protection of the laws. One member of the Court which decided the *Civil Rights Cases* previously had written that denial included omission to protect

as well as the omission to pass laws for protection. Legislators concerned with the scope of the Fourteenth Amendment expressed similar views. The *Civil Rights Cases* were decided on the assumption that the States in question protected those rights. It is doubtful that the result would have been the same if then, as today in South Carolina, the States actively interfered with the right of equal access to public facilities. No State may abdicate its responsibilities by ignoring them; and where a State by its inaction has made itself a party to the refusal of service and has placed its power and prestige behind discrimination, convictions such as those obtained in this case must fall.

II.

The convictions violate petitioners' rights to freedom of speech and expression as secured by the due process clause of the Fourteenth Amendment against state infringement. Petitioners' action here, a sit-in, is a well recognized form of protest and was entirely appropriate to the circumstances, including the use to which the private property involved had been dedicated by the owner. The property owner implicitly consented to the expression and did not seek the intervention of the criminal process. There were no speeches, picket signs, handbills, or other forms of expression which might possibly be inappropriate to the time and place. There was merely a request to be permitted to purchase goods in the place provided for such purchases. The expression was not in such circumstances or of such a nature as to create a clear and present danger of any substantive evil the State had a right to prevent. The arrests improperly stifled a protest against racial discrimination.

The statute applied to convict petitioners was unreasonably vague and thereby offends the due process clause of

the Fourteenth Amendment. The statute was construed by the Court below to uphold convictions obtained without proof that petitioners were requested to leave by a person who had established authority to issue such request at the time given. If in the circumstances of this case freedom of speech and expression are to be curtailed, petitioners have a right to expect reasonable notice of such a rule in the statute under which the convictions were obtained.

ARGUMENT

I.

South Carolina in Enforcing Racial Discrimination Has Denied to Petitioners the Equal Protection of the Laws Secured by the Fourteenth Amendment.

A. Petitioners' Exclusion From the Lunch Counter, and Their Arrest and Conviction, Was Required by an Ordinance of the City of Greenville Which Compels Segregation in Eating Facilities in Violation of Petitioners' Rights to the Equal Protection of the Laws as Secured by the Fourteenth Amendment.

Although petitioners were formally charged and convicted of trespass, in actuality the "trespass" consisted solely of violating the City of Greenville's affirmative requirement of racial segregation. This legal requirement of segregation is expressed in Section 31-8, Code of Greenville, 1953, as amended 1958 Cumulative Supplement, see *supra* pp. 2-3, making it unlawful "to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter" unless "separate eating utensils . . . dishes . . . tables, counters or booths" are provided and "a distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served" (R. 49).

In short, the City of Greenville determined that petitioners' conduct would be unlawful even if the department store had consented to serve them at the lunch counter.

G. W. West, the Manager of the department store, testified explicitly that exclusion of Negroes from the lunch counter, and the closing of the counter when petitioners sought service, was necessary because of the City Ordinance requiring segregation in eating facilities (R. 23).[2] Captain Bramlette, the arresting officer, was unclear as to the distinction between the City Ordinance requiring segregation and the State trespass statute (R. 15-17).

On this record, it is clear that Kress and Company would have been willing to cope with the controversy within the realm of social and economic give and take absent the Ordinance of the City of Greenville requiring segregation and the force of local customs supported by the City and the State of South Carolina, see *infra* pp. 22-28.

Prior to this demonstration, petitioners had been told by Store Manager West that he would not press charges if petitioners attempted to sit-in at the lunch counter (R. 38). Although a store employee called the police (R. 22), petitioners were not permitted at the trial, to ascertain if this was due to prearrangement (R. 22, 23). West did not request the arrest of petitioners, nor did he sign the complaint against them (R. 5, 16, 17).

If, as the manager testified, S. H. Kress & Company maintained the policy of segregation because of the Ordinance then there can be no other conclusion than that the City, by the Ordinance and by arrest and criminal convic-

[2] Mr. West testified at R. 23:

"Q. Mr. West, why did you order your lunch counter closed? A. It's contrary to local customs and it's also the ordinance that has been discussed."

tion, has "place[d] its authority behind discriminatory treatment based solely on color . . ." Mr. Justice Frankfurter, dissenting in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 727. The City Ordinance is no abstract exhortation but obligatory by its terms, to which were attached criminal sanctions, and it is uncontradicted that S. H. Kress & Company chose a policy of racial segregation because of the Ordinance.

Petitioners' arrest and conviction result, therefore, directly from the formally enacted segregation command of the City of Greenville, South Carolina, and not (so far as this record indicates) from any individual or corporate business decision or preference of the management of the store to exclude Negroes from the lunch counter. Whatever the choice of the property owner may have been, here the City made the choice to exclude petitioners from the property through its segregation Ordinance. This City segregation policy was enforced by petitioners' arrests, convictions and sentences in the South Carolina courts.

The Supreme Court of South Carolina dismisses reference to the City segregation Ordinance by stating "The Ordinance was made a part of the record upon request of defendants' counsel but defendants were not charged with having violated any of its provisions" (R. 59). But, the Constitution forbids "sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U. S. 268, 275.[3] In fact, the very existence of the Ordinance placed the "power" and "prestige" of the State behind

[3] Racial segregation imposed under another name often has been condemned by this Court. *Guinn* v. *U. S.*, 238 U. S. 347; *Lane* v. *Wilson*, *supra*; *Davis* v. *Schnell*, 81 F. Supp. 872 (S. D. Ala. 1949), aff'd 336 U. S. 933; and see *Louisiana State University and A. & M. College* v. *Ludley*, 252 F. 2d (5th Cir. 1958), cert. denied 358 U. S. 819.

racial discrimination. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725.

By enacting first, that persons who remain in a restaurant when the owner demands that they leave are "trespassers," and then enacting that restaurants may not permit Negroes to remain in white restaurants, South Carolina has very clearly made it a crime (a trespass) for a Negro to remain in a white restaurant. The manager of Kress's admits as much when he testified that the lunch counters were closed and petitioners asked to leave because of the Ordinance (R. 23).

This case thus presents a plain conflict with numerous prior decisions of this Court invalidating state efforts to require or authorize racial segregation. *Buchanan* v. *Warley*, 245 U. S. 60; *Brown* v. *Board of Education*, 347 U. S. 483; *Gayle* v. *Browder*, 352 U. S. 903, aff'g 142 F. Supp. 707, 712 (M. D. Ala. 1956); *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877; *State Athletic Commission* v. *Dorsey*, 359 U. S. 533; cf. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 727. Note the dissenting opinion of Judges Bazelon and Edgerton in *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d 835, 843 (D. C. Cir. 1961) (dealing primarily with the related issue of whether a proprietor excluding a Negro under an erroneous belief that this was required by state statute was liable for damages under the Civil Rights Act; the majority applied the equitable abstention doctrine). Indeed, *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847 (4th Cir. 1959) relied upon by the Supreme Court of South Carolina below, indicated that racial segregation in a restaurant "in obedience to some positive provision of State law" would be a violation of the Fourteenth Amendment. See also *Boman* v. *Birmingham Transit Com-*

pany, 280 F. 2d 531 (5th Cir. 1960); *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961).

B. Arrest, Conviction, and Sentence to Prison for Trespass for Having Violated the S. H. Kress Co.'s Requirement of Racial Segregation at Its Public Lunch Counter Deny Petitioners the Equal Protection of the Laws Secured by the Fourteenth Amendment.

In affirming the conviction below the Supreme Court of South Carolina held it was enforcing the right of a proprietor to select the clientele he will serve on "purely personal grounds" (R. 58). While in some circumstances there may be a personal privilege of making racial distinctions, the limit of that privilege certainly is reached when the person exercising it turns to state instrumentalities for assistance. There is no clear legal right of racial discrimination. *Shelley* v. *Kraemer*, 334 U. S. 1. Racial discrimination is constitutionally inadmissible when "the state in any of its manifestations has been found to have become involved in it." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.[4]

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[4] Segregation has been forbidden in schools, *Brown* v. *Board of Education*, 347 U. S. 483; *Cooper* v. *Aaron*, 358 U. S. 1; parks and recreational facilities, *Mayor etc. of Baltimore* v. *Dawson*, 350 U. S. 877; *Holmes* v. *Atlanta*, 350 U. S. 879; *New Orleans City Park Improvement Ass'n* v. *Detiege*, 358 U. S. 54; and airports, *Turner* v. *Memphis*, 369 U. S. 350; *Henry* v. *Greenville Airport Comm'n*, 284 F. 2d 631 (4th Cir. 1960).

Segregation requirements have been prohibited in privately sponsored athletic contests, *State Athletic Comm'n* v. *Dorsey*, 359 U. S. 533; and in connection with privately owned transportation facilities, *Gayle* v. *Browder*, 352 U. S. 903; *Evers* v. *Dwyer*, 358 U. S. 202; *Bailey* v. *Patterson*, 369 U. S. 31; *Taylor* v. *Louisiana*, 370 U. S. 154; *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960). A State law construed to authorize discrimination by privately owned restaurants was thought to be "clearly violative of the Fourteenth Amendment" by Mr. Justice Stewart, concurring in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 727. Three dissenting Justices agreed this would follow if that were a proper

"[I]t has never been suggested that state court action is immunized from the operation of [the Fourteenth Amendment] . . . simply because the act is that of the judicial branch of the state government." *Shelley* v. *Kraemer*, 334 U. S. at 18. See also *Barrows* v. *Jackson*, 346 U. S. 249; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 499, 463. Police action which segregates denies Fourteenth Amendment rights. *Taylor* v. *Louisiana*, 370 U. S. 154; *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 533, note 1 (5th Cir. 1960); see also *Monroe* v. *Pape*, 365 U. S. 167; *Screws* v. *United States*, 325 U. S. 91. "Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a prior agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms." *Shelley* v. *Kraemer*, 334 U. S. at 20; see also *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.

In the *Civil Rights Cases*, 109 U. S. 3, 17, this Court held outside the Amendment's scope individual action "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings" or "not sanctioned in some way by the State" 109 U. S. at 17. The opinion referred to "State action of every kind" inconsistent with equal pro-

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construction of the law, 365 U. S. 715, 727, 729. State laws requiring segregation in the use and occupancy of privately owned property were invalidated in *Buchanan* v. *Warley*, 245 U. S. 60; and *Harmon* v. *Tyler*, 273 U. S. 668.

Among the numerous cases forbidding segregation in publicly owned but privately leased facilities, see *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Turner* v. *Memphis*, 369 U. S. 350; *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U. S. 971, vacating and remanding, 202 F. 2d 275; *Derrington* v. *Plummer*, 240 F. 2d 922 (5th Cir. 1956), cert. den. *sub nom. Casey* v. *Plummer*, 353 U. S. 924.

tection of the laws, *id.* at p. 11; to "the operation of State laws, and the action of State officers executive or judicial," *id.* at p. 11. Repeatedly, the opinion held within the scope of the Fourteenth Amendment "state laws of state proceedings," *id.* at 11; "some State action," *id.* at 13; "acts done under State authority," *id.* at 13; "State action of some kind," *id.* at 13; and the opinion pointed out that "States are forbidden to legislate or act in a particular way," *id.* at 15. The Fourteenth Amendment is "addressed to counteract and afford relief against state regulations or proceedings," *id.* at 23.

Racial discriminations "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100. Certainly in this case the State is more deeply implicated in enforcing that racism so odious to our Constitution than it was in *Shelley* v. *Kraemer*. For here, the State has not merely held its courts open to suitors who would seek their aid in enforcing discrimination, but has taken the initiative in arresting and prosecuting petitioners criminally and sentencing them to fines or prison terms.

Moreover, petitioners here assert not merely the generalized constitutional right found in the equal protection clause of the Fourteenth Amendment to be free from racial discrimination. 42 U. S. C. 1981 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U. S. C. 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to * * * purchase * * * real and personal property." Referring to similar statutory provisions in-

volving jury service, this Court has declared: "For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination." *Fay* v. *New York*, 332 U. S. 261, 282-283.

The opinion below stresses that Kress's is "a privately owned business" (R. 58). But "private" is a word of several possible meanings. To the extent that concepts of privacy play a part in defining rights here at issue, Kress's privacy should be seen as it really is. Any suggestion that some exception to the *Shelley* rule should be made for a corporation which has sought state aid in enforcing racial discrimination in its enterprise open to the general public for profit, because somehow the inviolability of a private home may be impaired, is without merit. This prosecution is not asserted to be in aid of any interest in privacy of the property owner, for it has opened the store to the public in general. And the lunch counter was not closed after petitioners were seated in order to exert any claim of privacy but to conform with local law (R. 23). As soon as petitioners were arrested by the police and removed, the lunch counter was reopened (R. 23). For this reason, the suggestion of the Supreme Court of South Carolina that a business is "not devoted to public use" once an individual's "implied license to enter" is revoked is not sound (R. 58, 59). Moreover, the proprietor here has not expressed *its* preference, rather it has sought state aid to enforce the custom of the community. Were a state to enforce a trespass law to protect a real interest in some private aspect of property a different result might be required because of the importance of the right of privacy which finds firm support in the decisions of this Court. Examples where such countervailing considerations have applied are cases such as

Breard v. *Alexandria*, 341 U. S. 622, 626, 644, and *Kovacs* v. *Cooper*, 336 U. S. 77. On the other hand a case such as *Martin* v. *Struthers*, 319 U. S. 141, is an instance where even considerations of privacy did not overcome a competing constitutional right like freedom of religion.[5] In this case, the right to freedom from state imposed racial discrimination does not compete with any interest the state may have in protecting privacy.[6]

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[5] And see *Watchtower Bible and Tract Soc.* v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433 (1948) in which the New York courts distinguished between the right to solicit in the streets of a large scale housing project and to go, without invitation, into the hallways to visit private apartments.

[6] To weigh considerations of privacy in a case involving racial discrimination would comport with the views of the framers of the Fourteenth Amendment. During the debate on the bill introduced in the Senate by Charles Sumner of Massachusetts on December 20, 1871, to amend the *Civil Rights Act* of 1866, 14 Stat. 27, which served as the precursor to the *Civil Rights Act* of 1875, 18 Stat. 336, Senator Sumner distinguished between a man's home and places and facilities of public accommodation licensed by law: "Each person, whether Senator or citizen, is always free to choose who shall be his friend, his associate, his guest. And does not the ancient proverb declare that a man is known by the company he keeps? But this assumes that he may choose for himself. His house is his 'castle'; and this very designation, borrowed from the common law, shows his absolute independence within its walls; * * * but when he leaves his 'castle' and goes abroad, this independence is at an end. He walks the streets; but he is subject to the prevailing law of *Equality;* nor can he appropriate the sidewalk to his own exclusive use, driving into the gutter all whose skin is less white than his own. But nobody pretends that Equality on the highway, whether on pavement or sidewalk, is a question of society. And, permit me to say that *Equality in all institutions created or regulated by law* is as little a question of society" (emphasis added). After quoting Holingshead, Story, Kent, and Parsons on the common law duties of innkeepers and common carriers to treat all alike, Sumner then said: "As the inn cannot close its doors, or the public conveyance refuse a seat to any paying traveler, decent in condition, so must it be with the theater and other places of public amsuement. Here are institutions whose peculiar object is the 'pursuit of happiness,' which has been placed among the equal rights of all." Cong. Globe, 42d Cong., 2d Sess., 382-383 (1873).

It is not unreasonable that considerations of privacy should weigh so heavily. The right of privacy against intrusion on one's premises

C. Certainly, at Least, the State May Not by Its Police and Courts Enforce Such Segregation When It Stems From a Community Custom of Segregation Which Has Been Generated by State Law.

Certainly, at the very least, the well established rule—that states may not enforce racial discrimination—discussed in part B, applies where the racial segregation is not a matter of private choice, but expresses deep-rooted public policy.

That segregation was the custom of the community is stated expressly on the record, although one hardly need turn there to learn a fact concerning conditions in society so well known. *Child Labor Tax Case*, 259 U. S. 20, 37. Kress's manager, however, made clear that the store's segregation policy was merely that of community law and custom (R. 23).

> Q. Mr. West, why did you order your lunch counter closed? A. It's contrary to local customs and it's also the ordinance that has been discussed.
>
> Q. As I understand then further, that you are saying that the presence of Negroes at your lunch counter was contrary to customs? A. Yes, sir.

The *Civil Rights Cases* speak of "customs having the force of law," 109 U. S. 3, 16, as a form of state action.[7]

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or into one's personal affairs. 4 Blackstone's Commentaries Ch. 13, §5(6) (Wendell's Ed. 1850), was recognized at common law, and is recognized generally in American law. See A. L. I., Restatement of Torts, §867 (1939). This Court has recently reiterated that the due process clause protects privacy against intrusion by the States. *Mapp* v. *Ohio*, 367 U. S. 643, 654, 655; *Wolf* v. *Colorado*, 338 U. S. 25, 27-28. Cf. *Gilbert* v. *Minnesota*, 254 U. S. 325, 336 (Justice Brandeis dissenting); *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 464, 468.

[7] See also 109 U. S. at 21 "long custom, which had the force of law."

Here, as in *Garner* v. *Louisiana*, 368 U. S. 157, "[s]egregation is basic to the structure of . . . [the state] as a community; the custom that maintains it is at least powerful as any law." (Mr. Justice Douglas concurring at 181.)[8]

Custom in South Carolina is not separate from law. As indicated by the Greenville segregation ordinance, custom and law are interdependent. Custom has roots in and fills the interstices of a complex network of state mandated segregation. State and city imposed requirements govern not only activities furnished by the state but privately-owned facilities as well. The subordinate role to which the segregation laws relegate Negroes is well illustrated by §40-452, South Carolina Code of Laws, 1952, making it unlawful for white and colored employees in textile factories to (a) work together in the same room, (b) use same entrance or exit, (c) use and occupy same pay windows, (d) use same stairway or window at the same time, and (e) use at any time same lavatories, toilets, drinking water, buckets, pails, cups, dippers or glasses.

In South Carolina "Schools are segregated from grammar school up through college. Pupils are assigned to their respective schools by race."[9] State appropriations are inoperative for schools from or to which students transfer as a result of court order.[10]

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[8] This Court has recognized that "'Deeply embedded traditional ways of carrying out state policy . . .'—or not carrying it out—'are often tougher and truer law than the dead words of the written text.' *Nashville C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362, 369"; *Poe* v. *Ullman*, 367 U. S. 497, 502.

[9] Report of the South Carolina State Advisory Committee to the United States Commission on Civil Rights, "The 50 States Report" p. 564 (1961). S. C. Const. art. 11 §7 compels racial segregation in schools.

[10] South Carolina Code of Laws §21-2 (1957 Supp.). See also S. C. A. & J. R. 1952 (47) 2223, A. & J. R. 1954 (48) 1695 repealing

State law requires segregation at circuses and travelling shows;[11] in prisons and chain gangs;[12] on steam ferries and in railroad cars;[13] in station restaurants or eating places;[14] on street cars where Negroes are to be seated in the rear[15] and when standing are to be kept as far from whites as practicable;[16] Negroes and whites must separate on interurban cars[17] or may be sentenced to work on the county chain gang.[18] It is a crime in South Carolina to give a colored person custody of a white child.[19] Marriage of one of African descent to one who is not of African descent is prohibited.[20] Such a marriage is void and subjects the parties to criminal penalties.[21] The South Carolina park system is segregated by statute.[22] When a statute prohibiting joint use of parks in cities of over 60,000 in population was declared unconstitutional in *Clark* v. *Flory*,

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S. C. Const. art. 11 §5 (1895) which required legislature to maintain free public schools; S. C. Code §§*21-761 to -779* (regular school attendance) repealed by A. & J. R. 1955 (49) 85; §21-238 (1957 Supp.) (school officials may sell or lease school property whenever they deem it expedient); §21-230(7) (local trustees may or may not operate schools).

[11] S. C. Code §5-19 (1952).

[12] S. C. Code §55-1 (1952).

[13] S. C. Code §§58-714, 715, 718-720 (1952).

[14] S. C. Code §58-551 (1952).

[15] S. C. Code §58-1331 (1952).

[16] S. C. Code §58-1332 (1952).

[17] S. C. Code §58-1334 (1952).

[18] S. C. Code §§58-1337, 1338 (1952).

[19] S. C. Code §16-553 (1952).

[20] S. C. Const. art. 3 §33.

[21] S. C. Code §§20-7 to -8 (1952).

[22] S. C. Code §§51-1, 2.1-2.4 (1957 Supp.).

141 F. Supp. 248 (E. D. S. C. 1956),[23] a new statute immediately closed the park in question.[24] Public libraries are, with two exceptions, segregated and in some localities "Negroes who enter publicly supported libraries that are reserved for whites are subject to a fine . . . [or] . . . imprisonment."[25] The extent and persistence of local segregation cases in South Carolina generally and Greenville, South Carolina, in particular, can be judged from a trial warrant dated April 5, 1962, in which the City charged a Negro with the crime of violating "Sec. 31.10, the Code of City of Greenville S. C. 1953 Be Unlawful for Colored person to occupy Residence in White Block."[26] Cf. *Buchanan* v. *Warley*, 245 U. S. 60 (1914).

C. Vann Woodward has written of the relative recency of the segregation system in America:

> Southerners and other Americans of middle age or even older are contemporaries of Jim Crow. They grew up along with the system. Unable to remember a time when segregation was not the general rule and practice, they have naturally assumed that things have "always been that way." Or if not always, then "since slavery times," or "since The War," or "since reconstruction." Some even think of the system as existing along with slavery. Few have any idea of the relative recency of the Jim Crow laws, or any clear notion of how, when, and why the system arose. Woodward, The Strange Career of Jim Crow, pp. vii-viii (1955).

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[23] S. C. Code §§51-181-84 (1952).

[24] S. C. A. & J. R., 1956, No. 917.

[25] Report of the South Carolina State Advisory Committee to the United States Commission on Civil Rights, "The 50 States Report," p. 566 (1961).

[26] City of Greenville Trial Warrant No. 179, *City* v. *Robinson*.

Even after the end of Reconstruction and during the so-called period of "Redemption" beginning around 1877, the rigid segregation system characteristic of later years had not become the rule. The history of segregation makes clear that during the early years after Reconstruction Negroes were unsegregated in many public eating establishments in the South. *Id.* at 18-24. The Jim Crow or segregation system became all-pervasive some years later as a part of the aggressive racism of the 1890's and early 1900's, including Jim Crow laws passed at that time, which continued until an all-embracing segregation system had become the rule. In this way law shaped custom *id.* at ch. II.

Professor Woodward writes:

> At any rate, the findings of the present investigation tend to bear out the testimony of Negroes from various parts of the South, as reported by the Swedish writer Gunnar Myrdal, to the effect that 'the Jim Crow statutes were effective means of tightening and freezing —in many cases instigating—segregation and discrimination.' The evidence has indicated that under conditions prevailing in the earlier part of the period reviewed the Negro could and did do many things in the South that in the latter part of the period, under different conditions, he was prevented from doing. *Id.* at 90-91.
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> It has also been seen that their [Negroes] presence on trains upon equal terms with white men was once regarded as normal, acceptable, and unobjectionable. Whether railways qualify as folkways or stateways, black man and white man once rode them together and without a partition between them. Later on the stateways apparently changed the folkways—or at any rate the railways—for the partitions and Jim Crow cars

> became universal. And the new seating arrangement came to seem as normal, unchangeable, and inevitable as the old ways. And so it was with the soda fountains, eating places, bars, waiting rooms, street cars, and circuses. *Id.* at 91-92.

Thus the system of segregation in places of public accommodations, has from the beginning been a product of government, politics, and law.

This Court has recognized how law may work its effect in ways other than requiring obedience to statutory text. In *Pollock* v. *Williams*, 322 U. S. 4, the Court discharged the petitioner on a writ of habeas corpus because a statutory presumption had induced a plea of guilty:

> The State contends that we must exclude the prima facie evidence provision from consideration because in fact it played no part in producing this conviction. *Id.* at 13.
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> We cannot doubt that the presumption provision had a coercive effect in producing the plea of guilty. *Id.* at 15.

And see, *Engel* v. *Vitale*, 370 U. S. 421, 430 ("indirect coercive pressure upon religious immunities"). As was said in *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 463, "The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power . . . that private action takes hold." *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 463.[27]

[27] This Court has struck down state action which would enable private individuals to seek reprisals against persons opposed to racial discrimination. *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449. *A fortiori*, the link between state *requirements* of segregation and the conduct it fosters—not merely permits—should be recognized.

Therefore it hardly can be urged that the management was acting privately, unsanctioned by the state. Apart from state support of management's decision to segregate, that decision itself represented the policy of a City ordinance and the policy induced and nourished by the laws of South Carolina. As Mr. Justice Douglas wrote in *Garner v. Louisiana*, 368 U. S. 157, 181, the proprietor's "preference does not make the action 'private' rather than 'state,' action. If it did, a minuscule of private prejudice would convert state into private action. Moreover, where the segregation policy is the policy of a state, it matters not that the agency to enforce it is a private enterprise."

D. *A Fortiori*, the State May Not Arrest and Convict Petitioners for Having Violated a Segregation Policy Which Stems From a State Generated, Community Custom of Segregation in Premises in Which the State Is Deeply Involved Through Its Licensing and Regulatory Powers.

The nature of the State's involvement—demonstrated by extensive regulation and licensing—in the premises where petitioners were arrested for violating the state generated community custom shows even further the invalidity of the judgment below. This discrimination has been enforced in an area of public life with which the State is so intimately involved that Kress's lunch counter business is by law required to be extensively licensed and regulated. The very publicness of the enterprise is demonstrated not only by the fact that Kress serves the general public, but by the interest which the State has demonstrated in that service. In addition to the detailed regulation of business corporations (including foreign corporations)[28] South Carolina

[28] S. C. Code §§12-1 to 12-1083 (1952).

law requires and authorizes various licenses,[29] imposes taxes,[30] and requires state and authorizes local health regulation[31] of this type of business. As Mr. Justice Douglas wrote in *Garner* v. *Louisiana*, 368 U. S. at 183-84:

> A state may not require segregation of the races on conventional public utilities any more than it can segregate them in ordinary public facilities. As stated by the court in Boman v Birmingham Transit Co. (CA 5 Ala) 280 F2d 531, 535, a public utility "is doing something the state deems useful for the public necessity or convenience." It was this idea that the first Mr. Justice Harlan, dissenting in Plessy v Ferguson, . . . advanced. Though a common carrier is private enterprise, "its work" he maintained is public. *Id.* 163 US at

[29] Chain stores are licensed by the state. S. C. Code §§65-1381-1391 (1952). S. C. Code §§25-51, 52 (1952), authorizes towns and cities to regulate, license and inspect restaurants and lunch counters. When city or town ordinances are not complied with, the license may be revoked and the licensee subject to criminal penalties, S. C. Code §§52-53, 54 (1952). Respondents' Opposition to Petition for Writ of Certiorari, p. 5, is, therefore, incorrect when it states: "The only license it [Kress & Company] is dependent upon is the continued good will of the buying public."

[30] South Carolina law requires a license tax, S. C. Code §65-1382 (1952). Retail stores collect a sales tax (Chain Store Tax), S. C. Code §65-1401 (1952) and are required to keep and preserve records of gross receipts. S. C. Code §65-1449 (1952). In addition, South Carolina has a use tax which applies to retailers, S. C. Code §§65-1421-1433 (1952).

[31] State law prescribes comprehensive regulations for places where food is to be served. See Rules and Regulations, S. C. Code, Title 7, pp. 593-596. Restaurants are inspected and graded, *Ibid.* at pp. 593-4; must display the grade received on health inspection, *Ibid.* at p. 593; keep outside doors screened, S. C. Code §35-125 (1952); furnish a clean towel and individual soap (use of roller towels prohibited) S. C. Code §35-126 (1952); clean refrigerators and ventilate kitchens, S. C. Code §35-130 (1952); cover garbage in barrels or galvanized iron cans, S. C. Code §35-133 (1952). Restaurant employees must receive a physical examination before employment, S. C. Code §35-135 (1952). Local regulation is authorized by S. C. Code §§25-51 *et seq.* (1952).

> 554. And there can be no difference, in my view, between one kind of business that is regulated in the public interest and another kind so far as the problem of a State that licenses a business can license it to serve only whites or only blacks or only yellows or only browns. Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment.

In *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, this Court found sufficient governmental responsibility to require decision of a Fifth Amendment due process claim where the principal governmental involvement was a decision by a regulatory body to do nothing about private activity (radio broadcast on streetcars) it could have prohibited. The lunch counter in this case is also regulated by government, although perhaps not so closely as the streetcar company in *Pollak*. But this case has an element that the *Pollak* case did not, i.e., that government has done so much to encourage racial segregation in public life that it must share responsibility for the discriminatory rule.

And see *Steele* v. *Louisville and Nashville R.R. Co.*, 323 U. S. 192; *Nixon* v. *Condon*, 286 U. S. 73; *Betts* v. *Easley*, 161 Kan. 459, 169 P. 2d 831. In each of these cases, state initiative and licensing in establishing and maintaining the enterprise led to a holding or implication that the Fifth or Fourteenth Amendments forbid racial discrimination.

Here, indeed, is a case where the State "to some significant extent" in many meaningful "manifestations has been found to have become involved . . . . " *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.

E. No Essential Property Right of S. H. Kress and Co. Is Here at Issue; the Right to Make Racial Distinctions at a Single Counter in a Store Open to the Public Does Not Outweigh the High Purposes of the Fourteenth Amendment.

The highest court of South Carolina attempted to differentiate this case from others which have refused to sanction state enforcement of racial discrimination by asserting that it was merely neutrally enforcing (R. 57, 58) a "right of those in control of private property" (R. 58) irrespective of color. The court defined the property right as "the liberty to revoke [the implied] license [to enter] at any time" (R. 58).

By failing to analyze the property right in question, however, the court, in effect, assumed that the right of the property owner to racially discriminate was inviolate. States can, of course, prohibit racial discrimination in public eating places without offending any constitutionally protected property rights.[32] And though the laws violate the Fourteenth Amendment, South Carolina and the City of Greenville here imposed the requirement of racial segregation on private property owners.[33] Thus, of course, the asserted property right to treat the races as one desires on his property is very far indeed from an absolute right and has not even been so regarded by South Carolina. "[T]he power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." *Shelley* v. *Kraemer*, 334

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[32] See *Western Turf Ass'n* v. *Greenberg*, 204 U. S. 359; *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88; *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28. Konvitz & Leskes, *A Century of Civil Rights*, 172-177 (1961).

[33] See pp. 24 to 25, *supra*, citing South Carolina laws requiring segregation on private property and R. 49 setting forth Greenville's segregation in eating facilities ordinance.

U. S. 1, 22, citing *Marsh* v. *Alabama*, 326 U. S. 501. Indeed, the Court said in *Marsh* v. *Alabama*, *supra*, at 506 that constitutional control becomes greater as property is more public in its use:

> The more an owner for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. Republic Aviation Corp. v. Labor Board, 324 U. S. 793, 798, 802, n. 8.

Of course, the Fourteenth Amendment does not forbid a state to assist in the enforcement of property rights as such. Indeed, for an obvious example, the state has an obligation not to engage in or assist in the invasion of the privacy of the home. Considerations of privacy, discussed in more detail, *supra*, pp. 20-21, offer one useful basis for distinguishing between permissible and impermissible types of state action.

Since "property or ownership" is, as Mr. Justice Cardozo has written, a "bundle of privileges" *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582, or as stated elsewhere, "a group or bundle of rights" given by the state, Blodgett, *Comparative Economic Systems* 24 (1944), it matters a great deal which of the rights or privileges constituting Kress's property was enforced in this prosecution. Various characteristics of the property interest demonstrate that this case should not depart from the general rule that states may not support racial discrimination.

The asserted property interest is but a claimed right to control the conduct and associations of others. But this claimed right is clearly separable from other incidents of ownership of the property such as fixing prices, choosing

merchandise for sale, setting hours of business, selling the business or closing it down, to name but a few.

The power to regulate the conduct and associations of others has never been an unrestrained property right. Illustrations include limitations that the law has placed on those who would use their property to control the conduct of donees, as by requiring divorce or separation,[34] or with respect to marriage,[35] restrictions compelling separation of a child from its parents,[36] and requirements controlling certain personal habits.[37]

The power to impose restraints on alienation has been severely limited by courts and legislatures.[38] Restrictive

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[34] Provisions requiring divorce or separation were held void in: *Dwyer* v. *Kuchler*, 116 N. J. Eq. 426, 174 Atl. 154 (Ch. 1934); *In Re Haight's Will*, 51 App. Div. 310, 64 N. Y. S. 1029 (2d Dept. 1900); *Davidson* v. *Wilmington Trust Co.*, 23 Del. Ch. 1, 2 A. 2d 285 (Ch. 1938); *Winterland* v. *Winterland*, 389 Ill. 384, 59 N. E. 2d 661 (1945); *Hawke* v. *Euyhart*, 30 Neb. 149, 46 N. W. 422 (1890); *Cruger* v. *Phelps*, 21 Misc. 252, 47 N. Y. S. 61 (Sup. Ct. 1897).

[35] Certain marriage clauses have been held ineffective—6 Powell, *Real Property* ¶851; A. L. I., *Restatement of Property*, ¶849, n. 1, §424 (1944); *Maddox* v. *Maddox, Adm'r*, 52 Va. 804 (1954).

[36] Restrictions which compel the separation of a minor child from its parent have not been viewed with favor, 6 Powell, *Real Property* ¶858, at 64; *In Re Carple's Estate*, 140 Misc. 459, 250 N. Y. S. 680 (Surr. Ct. 1931); *In Re Forte's Will*, 149 Misc. 327, 267 N. Y. S. 603 (Surr. Ct. 1933); *In Re Ranney's Estate*, 161 Misc. 626, 292 N. Y. S. 476 (Surr Ct. 1936).

[37] *Holmes* v. *Connecticut Trust & Safe Deposit Co.*, 92 Conn. 507, 103 Atl. 640 (1918) (condition that conveyee's husband abstain from tobacco and liquor held void); cf. *D'Arcangelo* v. *D'Arcangelo*, 137 N. J. Eq. 63, 43 A. 2d 169 (Ch. 1945) (legatee must employ testator's brother as bus driver, at designated salary for a corporation in which legatee had received an interest; invalidated).

[38] Gray, *Restraints on the Alienation of Property*, §259 (2d ed. 1895, A. L. I., *Restatement of Property*, Div. 4, Social Restrictions Imposed upon the Creation of Property Interests, p. 2121 (1944); Browder, *Illegal Conditions and Limitations: Miscellaneous Provisions*, 1 Okla. L. Rev. 237 (1948).

covenants have been limited by common law.[39] Their enforcement in courts of equity[40] and courts of law[41] has been forbidden by the Fourteenth Amendment where race was the reason for the restriction. And, of course, the rule against perpetuities is of ancient lineage.[42]

A business man is not always free to set his own prices. The fair trade acts on the one hand, approved by the Miller-Tydings Act amendment of §1 of the Sherman Act, 15 U. S. C. §1, require some businessmen to sell at fixed prices. Anti-trust concepts on the other hand, originating in the common law, *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940), *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U. S. 211 (1899), and embodied in the statutes of the United States, Robinson-Patman Act, 15 U. S. C. §13 *et seq.*; Clayton Act, 15 U. S. C. §12 *et seq.*; Sherman Anti-Trust Act, 15 U. S. C. §1 *et seq.*, have condemned price discrimination, price fixing, and conspiracies to fix resale prices. The right to select customers has also been curtailed by the antitrust laws,[43] as well as common law, and even the right of a single trader has been greatly limited.[44]

Numerous statutes and ordinances limit property holders in their power to refuse to sell or rent on grounds of

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[39] *Porter* v. *Barrett*, 233 Mich. 373, 206 N. W. 532 (1925).

[40] *Shelley* v. *Kraemer*, 334 U. S. 1.

[41] *Barrows* v. *Jackson*, 346 U. S. 249.

[42] Gray, *The Rule Against Perpetuities* §201 (4th ed. 1942); 6 Powell, *Real Property*, ¶759-827; Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638 (1938).

[43] *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207 (1959); *Lorain Journal Co.* v. *U. S.*, 342 U. S. 143 (1951).

[44] *United States* v. *Colgate*, 250 U. S. 300 (1919); See *U. S.* v. *Parke Davis & Co.*, 362 U. S. 29 (1960); Rankin, *The Parke, Davis Case*, 1961 Antitrust Law Symposium, New York State Bar Association Section on Antitrust Law 63 (1961).

race or color[45] or to refuse to serve patrons in public accommodations on the grounds of race or color.[46] Historically, the right to select customers has been limited by common law and statute.[47] It is well known that innkeepers

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[45] Cal. Health & Safety Code §35740; Mass. G. L. c. 151B, §6 (Supp. 1961); N. J. Stat. Ann. §18:25-4 (Supp. 1961); Wash. Rev. Code §§49.60.030, 49.60.040 (1957); Cal. Civil Code, §51 (Supp. 1961); Colo. Rev. Stat. Ann. §§69-7-1, to 69-7-7 (Supp. 1960); Conn. Stat. Rev. §53-35 (Supp. 196); Mass. Gen. L. c. 151B, §4 (Supp. 1961), as amended by Acts, 1961, c. 128; Minn. Stat. Ann. §§363.01-.13, as amended by L. 1961, c. 428 to become effective in 12/31/62; Ore. Rev. Stat. §659.033 (1959); N. H. Rev. Stat. Ann. §354:1 (Supp. 1961); N. Y. Executive Law, §290 (Supp. 1962); Pa. Stat. Ann., tit. 43, §953 (Supp. 1961). Cases holding some of the ordinances and statutes constitutional are: *Levitt & Sons, Inc.* v. *Division Against Discrimination*, 31 N. J. 514, 158 A. 2d 177 (1960); *Mass. Comm'n Against Discrimination* v. *Colangelo*, 30 U. S. L. W. 2608 (Mass. 1962); *State Comm'n Against Discrimination* v. *Pelham Hall Apartments*, 10 Misc. 2d 334, 170 N. Y. S. 2d 750 (Sup. Ct. 1958).

[46] Cal. Civil Code, §§51-52 (Supp. 1960); Colo. Rev. Stat. Ann. 25—1—1 *et seq.* (1953); Conn. Gen. Stat. Rev. §53-35 (Supp. 1961); D. C. Code §47-2901 *et seq.* (Supp. 1960); Indiana Stat. Ann. §§10-901, 10-902 (Supp. 1962); Iowa Code Ann. §735.1 (1950); Kansas Gen. Stat. Ann. §21-2424 (1949); Mass. Gen. L. c. 272, §§92A, 98 (1956); Mich. Stat. Ann. §28.343 (Supp. 1959); Minn. Stat. Ann. §327.09 (1947); Mont. Rev. Codes §64-211 (Supp. 1961); Neb. Rev. Stat. §§20-101, 102 (1943); N. H. Rev. Stat. Ann. §354:1 (Supp. 1961); N. J. Stat. Ann. §§10:1-2 to 10:1-7 (1960); N. M. Stat. Ann. §§49-8-1 to 49-8-6 (Supp. 1961); N. Y. Civil Rights Law §40 (1948); Executive Law, §§292(9), 296(2) (Supp. 1962); N. D. Cent. Code, §12-22-30 (Supp. 1961); Ohio Rev. Code §4112.02(G) (Supp. 1961); Ore. Rev. Stat. §§30.670-.680, as amended by L. 1961 c. 247; Pa. Stat. Ann., tit. 18, §4654 as amended by Act No. 19 (1961); R. I. Gen. Laws §§11-24-1 to 11-24-6 (1956); Vt. Stat. Ann., tit. 13, §§1451, 1452 (1958); Wash. Rev. Code, §§49.60.040, 49.60.215 (1962); Wis. Stat. Ann. §924.04 (1958), as amended (Supp. 1962); Wyo. Stat. §§6-83.1, 6-83.2 (Supp. 1961).

[47] Mund, "The Right to Buy—And Its Denial to Small Business," Senate Document #32, 85th Cong., 1st Sess., Select Committee on Small Business (1957); Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135 (1914); Statute of Labourers, 25 Ed. III, Stat. 1 (1350) (no one could refuse to practice his calling to whomsoever applied). The following statutes penalized a businessman's refusal to

and carriers do not have freedom arbitrarily to select or reject patrons. Beale, *The Law of Innkeepers and Hotels* (1906).

The foregoing limitations on the power to control the conduct and associations of others describe particular examples of the general principle that "property rights" are not absolute in the sense that common law, statute, and constitution may not limit or shape them where they have harmful public consequences. Further examples indicate different aspects of this thoroughly settled, fundamental legal truth. Property owners have been compelled to destroy valuable cedar forests which harbored fungus threatening neighboring apple orchards,[48] to spend funds to install fire extinguishing equipment,[49] to limit the size of billboards,[50] and to make loaves of bread a certain size.[51] Moreover, employers have been compelled to allow labor organizational activities to be conducted on their property.[52] And only recently, property holders have been forbidden to use their property in a way which would, in the course of a program of racial discrimination, intimidate their

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serve all comers: (1357), 31 Ed. III, c. 10 (victualers); (1360), 35 Ed. III (fishermen); (1433), 11 Hen. VI, c. 12 (candlers); (1464), 4 Ed. IV, c. 7 (shoemakers); *Lane* v. *Cotton*, 1 Ld. Raym. 646, 655; 1 Salk. 18, 19; 12 Mod. 472, 484 ("If a man takes upon himself a public employment, he is bound to serve the public as far as the employment extends, and for refusal an action lies . . .").

[48] *Miller* v. *Schoene*, 276 U. S. 272 (1928).

[49] *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80 (1946).

[50] *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608 (1935); *St. Louis Poster Advertising Co.* v. *St. Louis*, 249 U. S. 269 (1919); *Thomas Cusack Co.* v. *Chicago*, 242 U. S. 526 (1917).

[51] *Schmidinger* v. *Chicago*, 226 U. S. 578.

[52] *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1955); *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793 (1945).

lessees in the exercise of the franchise. *United States* v. *Beaty*, 288 F. 2d 653 (6th Cir. 1961).

Other facets of the claimed property right to discriminate on the basis of race in these circumstances are clearly separable from the core of Kress's interest in its business. In addition to the fact that no privacy has been intruded upon, the asserted property right did not seek to protect the premises from use alien to their intended function. Petitioners sought only to purchase and consume food in an area provided for such activity. The asserted right to exclude expressed only a preference for racial segregation and not any objection to petitioners' demeanor or conduct. And this was not a private choice. It expressed community custom. The capricious nature of the discrimination was highlighted by the fact that this same store served Negroes and whites alike in fifteen to twenty departments selling over 10,000 items with the sole exception that Negroes are not served at the lunch counter which is reserved for whites (R. 14, 20-22). As in *Shelley* v. *Kraemer*, 334 U. S. 1, 10, the restriction did not limit the type of use made of the premises, nor the type of person or conduct permitted thereon except to refer to race.

Moreover, the property interest enforced below attempted only to achieve discrimination in a store thrown open by the owner to the general public (including Negroes) for his own business advantage. Cf. *Marsh* v. *Alabama*, 326 U. S. 501, 506. The specific area within the store in dispute, i.e., the lunch counter, was a public part of the premises and an integral part of a single commercial establishment serving the public

Consequently, the property interest enforced below is simply a claimed right to enforce racial discrimination in very particular circumstances. It obviously is not true that refusal to enforce this asserted incident of ownership de-

stroys the whole bundle of rights. That result would be contrary to the entire genius of our jurisprudence.

The premise that Kress owns the property does not lead to the ultimate logical extreme that it may absolutely control the conduct and associations of others in the store. Mr. Justice Holmes has written that "All rights tend to declare themselves absolute to their logical extreme, yet in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded and which become strong enough to hold their own when a certain point is reached." *Hudson Cty. Water Co.* v. *McCarter*, 209 U. S. 345, 355. Only last term, Mr. Justice Frankfurter, dissenting, pointed out the indubitable truth that "An end of discrimination against the Negro was the compelling motive of the Civil War Amendments. The Fifteenth expresses this in terms and it is no less true of the Equal Protection Clause of the Fourteenth". *Baker* v. *Carr*, 369 U. S. 186, 285-86. In the case at bar Kress's property is limited by the Fourteenth Amendment and does not reach the constitutionally untenable logical extreme that the states may aid the store in upholding racism. "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." *Shelley* v. *Kraemer*, 334 U. S. 1, 22.

F. In Any Event the Convictions Below Must Fall When, in Addition to the Foregoing, South Carolina Has Failed to Protect Negro Citizens in the Right to Equal Access to Public Accommodations.

Here, however, we have more than the elements set forth above—State arrest conviction and prison term; implementation of a community custom of racial segregation generated by state law; enforcement of an odious property right of minor consequence to the owner; elab-

orate state initiative and involvement in establishment and maintenance of the enterprise. Here the State has failed to provide what the *Civil Rights Cases* assumed the States did provide: "a right to enjoy equal accommodation and privileges," which this Court termed "one of the essential rights of the citizen which no state can interfere with." 109 U. S. at 19.

This Court has recognized that States' failure or refusal to act can deny the equal protection of the laws. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725; *Terry* v. *Adams*, 345 U. S. 461, 469; *Truax* v. *Corrigan*, 257 U. S. 312; see, *Lynch* v. *United States*, 189 F. 2d 476 (5th Cir. 1951); *Catlette* v. *United States*, 132 F. 2d 902 (4th Cir. 1943).

Indeed, it is questionable whether the verbal concept of "state action" in equal protection cases rests on more than a misunderstanding,[53] for the phrase, no state shall deny equal protection, refers even more naturally to state inaction than to state action.

Mr. Justice Woods, a member of the majority in the *Civil Rights Cases*, stated in *United States* v. *Hall*, 26 Fed. Cas. 79, 81 (No. 15,282 1871):

> Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.

His concurrence with the majority in the *Civil Rights Cases* may, therefore, be explained by his agreement with their

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[53] See, generally Mr. Justice Harlan dissenting in *Civil Rights Cases*, 109 U. S. 3, 26 62.

assumption that remedies against the discrimination in those cases existed under state law.

This indeed was a view held by some of the legislators concerned with the scope of the Amendment at or around the time of its passage. For example, Representative Wilson of Indiana in debates on the Enforcement Act of April 20, 1871, 17 Stat. 13, argued that the states were under an obligation to assure equality and that failure to do so was a denial of equal protection:

1. The provisions 'no State shall deny' and 'Congress shall have power to enforce' mean that equal protection shall be provided for all persons.

2. *That a failure to enact the proper laws for that purpose, or a failure to enforce them,* is a denial of equal protection. (Emphasis added.)

3. That when there is such a denial Congress may enact laws to secure equal protection.[54]

Representative Lawrence in debates on the Civil Rights Act of 1875 stated:

> What the State permits by its sanction, having the power to prohibit, it does in effect itself.[55]

Senator Pool in debates on the Enforcement Act of May 31, 1870, 16 Stat. 140, argued that:

> . . . but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. *It shall not deny by acts of omission* by a failure to prevent its own citizens

[54] Cong. Globe, 42nd Congress, 1st Sess., p. 483 (1871).

[55] Cong. Rec., 43d Cong., 1st Sess. 412 (1874).

> from depriving by force any of their fellow citizens of these rights.[56] (Emphasis added.)

This view is endorsed by the opinion in the *Civil Rights Cases*, for that decision was based on the assumption that the states in question would provide remedies securing to their citizens the right of access to places of public accommodation without racial discrimination:

> We have discussed the question presented by the law on the assumption *that a right to enjoy equal accomodations* and privileges in all inns, public conveyances and places of public amusement, *is one of the essential rights of the citizen which no state can abridge or interfere with* (109 U. S. at 19). (Emphasis added.)
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> Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and *presumably subject to redress by those laws until the contrary appears* (109 U. S. at 24). (Emphasis added.)

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[56] Cong. Globe, 41st Cong., 2d Sess. 3611 (1870).

Other contemporary congressmen also suggested that state inaction may be as culpable as action: In a speech delivered by Representative Bingham of Ohio, the framer of the key phrases in Section One, it was repeatedly stated that the Fourteenth Amendment granted Congress the power to act on individuals and could provide relief against the denial of rights by the states whether by "acts of omission or commission." Appendix to the Cong. Globe, 42d Congress, 1st Sess. 85. Representative Coburn of Indiana said that a state could deny equal protection by failing to punish individuals violating the rights of others. Cong. Globe, 42d Congress, 1st Sess. 459.

Mr. Justice Bradley's entire opinion was concerned with the question whether the Fourteenth Amendment had conferred on Congress the power to regulate the acts of private individuals when, as he presumed, the States were exercising their responsibilities toward the goal of eliminating racial discrimination. While he concluded in the negative, it is extremely doubtful that the result would have been the same if a state had been found to be in effect sanctioning private discrimination by laxity in this regard. See Konvitz & Leskes, *A Century of Civil Rights* 150 (1961); Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 Cornell L. Q. 375, 376; Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 Colum. L. Rev. 149, 184 (1935); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1, 21 (1959).

This case, therefore is like *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725:

> [T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction . . . the State . . . has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

For here in an area in which the State is deeply involved it has positively and negatively sanctioned the racial segregation which gave rise to this case.

II.

The Decision Below Conflicts With Decisions of This Court Securing the Right of Freedom of Expression Under the Fourteenth Amendment to the Constitution of the United States.

A. The Enforcement of the State and City Segregation Policy and the Interference of the Police Violated Petitioners' Right to Freedom of Expression.

Petitioners were engaged in the exercise of free expression, by verbal and nonverbal requests to the management for service, and nonverbal requests for nondiscriminatory lunch counter service, implicit in their continued remaining in the dining area when refused service. As Mr. Justice Harlan wrote in *Garner* v. *Louisiana*: "We would surely have to be blind not to recognize that petitioners were sitting at these counters, when they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country." 368 U. S. at 201. Petitioners' expression (asking for service) was entirely appropriate to the time and place at which it occurred. They did not shout or obstruct the conduct of business. There were no speeches, picket signs, handbills or other forms of expression in the store possibly inappropriate to the time and place. Rather they offered to purchase in a place and at a time set aside for such transactions. Their protest demonstration was a part of the "free trade in ideas," *Abrams* v. *United States*, 250 U. S. 616, 630, Holmes, *J.*, dissenting, within the range of liberties protected by the Fourteenth Amendment, even though nonverbal. *Stromberg* v. *California*, 283 U. S. 359 (display of red flag); *Thornhill* v. *Alabama*, 310 U. S. 88 (picketing); *West Virginia State Board of Education* v.

Barnette, 319 U. S. 624, 633-634 (flag salute); *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449 (freedom of association).

Questions concerning freedom of expression are not resolved merely by reference to the fact that private property is involved. The Fourteenth Amendment right to free expression on private property takes contour from the circumstances, in part determined by the owner's privacy, his use and arrangement of his property. In *Breard* v. *Alexandria*, 341 U. S. 622, 644 the Court balanced the "householders' desire for privacy and the publisher's right to distribute publications" in the particular manner involved, upholding a law limiting the publisher's right to solicit on a door-to-door basis. But cf. *Martin* v. *Struthers*, 319 U. S. 141, where different kinds of interests led to a corresponding difference in result. Moreover, the manner of assertion and the action of the State, through its officers, its customs and its creation of the property interest are to be taken into account.

In this constitutional context it is crucial, therefore, that the stores implicitly consented to the protest and did not seek intervention of the criminal law. For this case is like *Garner* v. *Louisiana*, *supra*, where Mr. Justice Harlan, concurring, found a protected area of free expression on private property on facts regarded as involving "the implied consent of the management" for the sit-in demonstrators to remain on the property. Petitioners informed the management that there would be a protest and received assurance that the management would not resort to the criminal process. Petitioners were not asked to leave the counter until the police arrived and the manager talked with the police. Petitioners were not permitted, at the trial, to inquire if the request to leave was arranged by the police (R. 22, 23). It does not appear that anyone connected with the store signed an affidavit or complaint against

petitioners. The police officer proceeded immediately to arrest the petitioners without any request to do so on the part of anyone connected with the store.

In such circumstances, petitioners' arrest must be seen as state interference in a dispute over segregation at this lunch counter, a dispute being resolved by persuasion and pressure in a context of economic and social struggle between contending private interests. The Court has ruled that judicial sanctions may not be interposed to discriminate against a party to such a conflict. *Thornhill* v. *Alabama, supra; San Diego Bldg. Trades Council* v. *Garmon*, 349 U. S. 236.

But even to the extent that the store may have acquiesced in the police action a determination of free expression rights still requires considering the totality of circumstances respecting the owner's use of the property and the specific interest which state judicial action supports. *Marsh* v. *Alabama*, 326 U. S. 501.

In *Marsh*, this Court reversed trespass convictions of Jehovah's Witnesses who went upon the privately owned streets of a company town to proselytize, holding that the conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793, the Court upheld a labor board ruling that lacking special circumstances employer regulations forbidding all union solicitation on company property constituted unfair labor practices. See *Thornhill* v. *Alabama, supra*, involving picketing on company-owned property; see also *N.L.R.B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945); *United Steelworkers* v. *N.L.R.B.*, 243 F. 2d 593, 598 (D. C. Cir. 1956), reversed on other grounds, 357 U. S. 357, and compare the cases mentioned above with *N.L.R.B.* v. *Fansteel Metal Corp.*, 306 U. S. 240, 252, condemning an employee

seizure of a plant. In *People* v. *Barisi*, 193 Misc. 934, 86 N. Y. S. 2d 277, 279 (1948) the Court held that picketing within Pennsylvania Railroad Station was not a trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those who use it." See also *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959); and *State of Maryland* v. *Williams*, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959).

In the circumstances of this case the only apparent state interest being subserved by these trespass prosecutions is support of the property owner's discrimination, which the manager testified was caused by the State's segregation custom and policy and the express terms of the City Ordinance. This is the only "interest" that the property owner can be found to have asserted.

Where free expression rights are involved, the question for decision is whether the relevant expressions are "in such circumstances and . . . of such a nature as to create a clear and present danger that will bring about the substantive evil" which the State has the right to prevent. *Schenck* v. *United States*, 249 U. S. 52. The only "substantive evil" sought to be prevented by these trespass prosecutions is the stifling of protest against the elimination of racial discrimination, but this is not an "evil" within the State's power to suppress because the Fourteenth Amendment prohibits state support of racial discrimination. See *Cooper* v. *Aaron*, 358 U. S. 1; *Terminiello* v. *Chicago*, 337 U. S. 1; *Sellers* v. *Johnson*, 163 F. 2d 877 (8th Cir. 1957), cert. denied 332 U. S. 851.

B. The Convictions Deny Petitioners' Right to Freedom of Expression in That They Rest on a Statute Which Fails to Require Proof That Petitioners Were Requested to Leave by a Person Who Had Established Authority to Issue Such Request at the Time Given.

In the courts below petitioners asserted that the statute in question denied due process of law secured by the Fourteenth Amendment to the Constitution of the United States in that it did not require that the person requesting them to leave the lunch counter establish his authority to make the demand. Although this issue was pressed below, the Supreme Court of South Carolina failed to construe the statute to require proof that the person who requested them to leave establish his authority.

If in the circumstances of this case free speech is to be curtailed, the least one has a right to expect is reasonable notice in the statute under which convictions are obtained, to that effect. *Winters* v. *New York*, 333 U. S. 507. Here, absent a statutory provision that the person making the request to leave be required to communicate that authority to the person asked to leave, petitioners, in effect, have been convicted of crime for refusing to cease their protests at the request of a person who could have been a stranger. The stifling effect of such a rule on free speech is obvious. See *Wieman* v. *Updegraff*, 344 U. S. 183; *Smith* v. *California*, 361 U. S. 147.

The vice of lack of fair notice was compounded where, as here, petitioners were convicted under a statute which designated two separate crimes, see *supra* p. 2, and a warrant which failed to specify under which section the prosecution proceeded (R. 5, 2, 3). Moreover, the warrant and the trial court stated that petitioners were charged with "trespass after warning" (R. 2) (Section (1) of the Statute speaks of being "warned"; Section (2) "without having

been warned"), but the prosecution offered no proof that petitioners had been "warned" within six months as required by Section (1) and apparently proceeded on the theory that Section (2) of the statute was involved.

This record is barren of any attempt by the City of Greenville to prove that the person who requested petitioners to leave identified his authority to do so to petitioners, and the courts of South Carolina, although urged by petitioners, failed to require such proof. While one of the petitioners brought out, when questioned by her own counsel, that she had spoken to the manager previously,[57] there is no evidence that the other petitioners knew the authority of the person who gave the order to leave. With rights to freedom of expression at stake, the City should be required to provide clear and unambiguous proof of all the elements of the crime. Identification of authority to make the request to leave is all the more important because of the active role played by the police in this case, for if the police were enforcing segregation clearly petitioners had a right to remain at the counter. *Garner* v. *Louisiana, supra.*

No one ordinarily may be expected to assume that one who tells him to leave a public place, into which the proprietor invited him and in which he has traded, is authorized to utter an order to leave when no claim of such authority is made. This is especially true in the case of a Negro seating himself in a white dining area in Greenville, South Carolina—obviously a matter of controversy and one which any stranger, or the police of a city with a segregation ordinance, might be expected to volunteer strong views. If the statute in question is interpreted to mean that one must leave a public place under penalty of being held a criminal

[57] She also testified that the police, not the manager, gave the order for petitioners to leave (R. 37, 41).

when so ordered to do so by a person who later turns out to have been in authority without a claim of authority at the time, it means as a practical matter, that one must depart from public places whenever told to do so by anyone; the alternative is to risk fine or imprisonment. Such a rule might be held a denial of due process. Cf. *Lambert* v. *California*, 335 U. S. 225. But if such is the rule the statute gives no fair warning, *Winters* v. *New York, supra; Burstyn* v. *Wilson*, 343 U. S. 495; *Saia* v. *New York*, 334 U. S. 558; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. Absent such notice, petitioners surely were entitled to assume that one may go about a public place under necessity to observe orders only from those who claim with some definiteness the right to give them.

Indeed, as a matter of due process of law, if it is the rule one must obey all orders of strangers to leave public places under penalty of criminal conviction if one uttering the order later turns out to have had authority, petitioners are entitled to more warning of its harshness than the statute's text affirmed. Cf. *Connally* v. *General Construction Co.*, 269 U. S. 385; *Lanzetta* v. *New Jersey*, 306 U. S. 451. Otherwise many persons—like these petitioners—may be held guilty of crime without having intended to do wrong. This Court has said, however, that:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. Morrissette v. U. S., 342 U. S. 246, 250.

Morrissette, of course, involved a federal statute as treated in the federal courts. But it expresses the fundamental view that *scienter* ought generally to be an element in criminality. See Sayre, *Public Welfare Offenses*, 33 Columbia L. Rev. 55, 55-6 (1933). The pervasive character of *scienter* as an element of crime makes it clear that a general statute like the ordinance now in question, in failing to lay down a *scienter* requirement, gives no adequate warning of an absolute liability. Trespass statutes like the one at bar are quite different from "public welfare statutes" in which an absolute liability rule is not unusual. See *Morrissette* v. *United States, supra*, 342 U. S. at 252-260.

On the other hand, however, if South Carolina were to read a *scienter* provision into this ordinance for the first time—which it has failed to do although the issue was squarely presented in this case—the lack of the necessary element of guilt, notice of authority, would require reversal under authority of *Garner* v. *Louisiana, supra; Thompson* v. *City of Louisville*, 362 U. S. 199.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.

Respectfully submitted,

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